Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting the Availability of Diverse and	)	MB Docket No. 16-41
Independent Sources of Video Programming	)	

COMMENTS OF RFD-TV

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COMMENTS OF RFD-TV

RFD-TV hereby submits these comments in response to the Notice of Proposed Rulemaking issued in the above-captioned docket.[1]

INTRODUCTION AND SUMMARY

RFD-TV was launched with two goals: to serve the needs and interests of rural America, and to reconnect rural and urban America. RFD-TV is an independent programmer that provides rural content to all Americans, not only in rural markets but also in urban and suburban markets throughout the country, including senior citizens. RFD-TV offers unique programming, including news programming, focused on agribusiness, equine, rural lifestyle, western sports, music, and family-friendly entertainment.

Unfortunately, today's video marketplace is failing to meet the needs of consumers who seek diverse and unique independent programming like RFD-TV. Media consolidation has led to a biased system with a fixed viewpoint. While some large programming conglomerates and large multichannel video programming distributors ("MVPDs") tout the diversity of their programming offerings, the reality is that a handful of urban-based media companies with bottleneck control over the distribution of programming are deciding for the American people

[1] *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, 31 FCC Rcd 11352 (2016) ("*NPRM*").

what constitutes "diverse" programming. Rural America and senior citizens are among the largest underserved populations in America and are continually being ignored by corporate America.[2] By having a small number of corporations focus only on their particular understanding of diversity—or the particular form of diversity that meets their business interests—the video marketplace is failing to vindicate the programming needs of *all* of America's underserved populations.

RFD-TV applauds the Commission for its efforts in promoting the availability of diverse and independent programming through this proceeding. Given our country's longstanding commitment to supporting independent voices, the Commission should view this proceeding as a first step in a comprehensive effort to promote and protect independent programmers. The Commission should take immediate action to prohibit unconditional most favored nation (MFN) and unreasonable alternative distribution method (ADM) provisions in carriage agreements between independent programmers and MVPDs. MFNs and ADMs impede competition and consumers' access to independent programming sources. In addition, the Commission should adopt rules that address MVPD practices such as bundling, lengthy contracts, and high termination fees that inhibit the distribution of diverse, independent programming.

The Commission has clear legal authority to implement these proposals. If adopted, these rules will provide guide posts within which programming negotiations involving independent programmers can occur on a more level playing field. By giving independent channels like RFD-TV a fair opportunity to reach viewers, the Commission can help bridge the

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[2] As RFD-TV founder, Patrick Gottsch, recently stated in an article published in Variety "[i]f it's not a drought or a disaster or something bad going on, we [rural America] just don't get coverage." Cynthia Littleton, *Network Aimed at Rural America Speaks for Population That Feels Underserved by the Media*, VARIETY (Jan. 17, 2017), http://variety.com/2017/tv/news/rfd-tv-rural-america-1201963217/.

growing divide between rural and urban America and deliver diverse content to consumers nationwide.

BACKGROUND

RFD-TV provides educational and informational content to the agribusiness, equine, and western sports communities that is not available on any other channel. With its investment in rural and agribusiness news in particular, RFD-TV has become the news and information programming channel representing rural America. It produces more than thirty hours per week of rural-focused live newscasts, including broadcasts from its news bureau at the U.S. Department of Agriculture in Washington, D.C., which provides information relevant to rural interests about developments on Capitol Hill and at other Federal agencies. And from its Chicago news bureau, RFD-TV supplies daily reporting directly from the grain and livestock pits at the Chicago Mercantile Exchange. Moreover, in 2015, RFD-TV – in a joint venture with Mediacom Communications – launched original programming that provided voters with a rare opportunity to see every U.S. presidential candidate appear in a town hall format before a live audience while responding to questions affecting agriculture and rural interests.

RFD-TV is committed to bridging the gap between urban and rural America. The divide between these two groups has never been more apparent. As the New York Times recently reported, "the widening political divergence between cities and small-town America … reflects a growing alienation between the two groups."[3] It is vital that rural interests be supported, and that urban America and rural America communicate effectively with each other. Urban content and

[3] Emily Badger et al., *The Election Highlighted a Growing Rural-Urban Split*, THE NEW YORK TIMES (Nov. 11, 2016), http://www.nytimes.com/2016/11/12/upshot/this-election-highlighted-a-growing-rural-urban-split.html?_r=0.

viewpoints should not be the only programming flowing throughout the country; rural issues and perspectives must also be distributed, understood, and respected.[4]

In addition to rural interests, RFD-TV also meets the programming needs of senior citizens in several ways. For example, RFD-TV, in partnership with AARP, broadcasts a monthly live one-hour call-in show to address issues affecting senior citizens such as health care, consumer protection, and retirement planning. RFD-TV also showcases entertaining rural lifestyle and traditional country music programming on nights and weekends that is highly popular with seniors.

RFD-TV has won numerous awards for its programming, including its flagship news programs, Market Day Report and the Rural Evening News, as well as for the value it provides to MVPDs. Of note, in 2015, RFD-TV was ranked as a "Best Bargain" cable network for the third year in a row according to the 20th Annual Independent Cable Network Survey. Most recently, RFD-TV's Rural Town Hall series was awarded the 2016 CableFax award for Public Affairs programming.

RFD-TV is consistently ranked in or near the top 20% of all cable networks watched in terms of time spent viewing. Notably, RFD-TV's viewer base extends beyond rural areas. Indeed, independent research has consistently shown that RFD-TV has an even higher percentage of its viewership in urban markets because of the large number of senior citizens in those markets who are interested in the variety of content that RFD-TV provides.

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[4] In its continuing effort to reconnect city with country RFD-TV organized the "Rural Tractor Brigade" that was part of the 2017 Inaugural Parade. Themed "We The People: Our American Journey," the Rural Tractor Brigade invited farmers and ranchers from across America to participate in the parade as a salute to America's agriculture industry. *See Rural Tractor Brigade Impresses the Nation*, RFD-TV (Jan. 23, 2017), http://www.rfdtv.com/story/34323451/rural-tractor-brigade-impresses-the-nation. For a picture of the Rural Tractor Brigade at the 2017 Inaugural Parade *see* Attachment A.

Despite its successes, RFD-TV has faced significant challenges in recent years in obtaining carriage for independent rural programming in a rapidly consolidating media landscape.

On August 13, 2013, Comcast – after its merger with NBCUniversal – dropped RFD-TV from carriage throughout Colorado and New Mexico, two western states with strong rural economies. In a single day, RFD-TV lost access to 470,000 homes in those states, which at the time represented 43% of RFD-TV's distribution on Comcast. Viewers in major markets such as Denver, Colorado Springs, Pueblo, and Albuquerque could no longer watch RFD-TV despite the channel's strong Nielsen ratings in these markets. In addition, since its merger with NBCUniversal in 2011, Comcast has stopped launching RFD-TV on its systems, thereby blocking RFD-TV from more than 21.5 million of Comcast's 22.3 million subscribers. Comcast's conduct is emblematic of the reality that distribution of independent programming is driven by the choices of a few urban-based programming executives.

On February 1, 2016, after eight years of carriage, Verizon unilaterally dropped RFD-TV entirely from distribution on its FiOS TV systems, with no prior notice to RFD-TV. Moreover, RFD-TV was not the first rural-oriented channel dropped by Verizon. Between March 2015 and October 2015, Verizon stopped offering The Weather Channel, the Sportsman Channel, and the Outdoor Channel. These popular channels offer original content and had substantial viewer bases that asked Verizon for continued carriage on FiOS TV. Over the first three weeks in January 2016, RFD-TV's passionate viewers submitted more than 50,000 emails, calls, and letters to Verizon's New York offices supporting RFD-TV and asking Verizon to reconsider its decision. Still, RFD-TV remains off Verizon systems.

Most recently, in August 2016, Frontier Communications dropped RFD-TV's sister channel, FamilyNet, which charges no carriage fees and is offered for free to MVPDs. It is RFD-TV's understanding that FamilyNet is being replaced with channels that will actually *pay* Frontier for carriage.

The loss of RFD-TV and other independent channels harms both rural and urban consumers. As the Commission is well aware, RFD-TV's viewers are not shy about expressing their views.[5] A majority of the over 36,000 comments filed to date in this proceeding are from RFD-TV consumers throughout the country that are interested in protecting rural-and senior-oriented programming. At least 2,500 of the comments submitted in this proceeding are handwritten letters from RFD-TV supporters, which speaks to the personal interest that consumers are taking in this proceeding. Consumers from across the country—including consumers in rural, urban, and suburban America—are doing everything they can to speak out in favor of rural- and senior-oriented programming. Unfortunately, when it comes to the MVPDs dropping this programming, these consumer pleas are falling on deaf ears.

Currently, the nation's largest MVPDs are predominantly urban, east-coast based behemoths that control a critical bottleneck to video distribution. When the only vehicles to obtain carriage are controlled by these urban-clustered cable companies and other urban distributors, the interests of rural Americans and senior citizens are ignored.[6] Rural America is

[5] *See NPRM* ¶ 5 n. 13 (noting that the vast majority of comments in this proceeding were letters from RFD-TV customers).

[6] Although for purposes of this proceeding RFD-TV is focusing on the overwhelming majority of MVPDs and MVPD practices that threaten unique independent programming, RFD-TV feels compelled to speak out to acknowledge when an MVPD is doing the right thing. In particular, RFD-TV would like to commend AT&T who, under the leadership of Randall Stephenson, has honored its commitment to expanding its services for rural America, and working to connect rural and urban America.

being severed from urban America – independent programming can help bridge the divide, but only if it is available to all consumers.

DISCUSSION

The country is currently at a tipping point with respect to independent voices. There is a real risk that all or most programming will be controlled by a few major media conglomerates. Large swaths of the population, including rural America and senior citizens, are not adequately represented by today's media market. If independent voices are to thrive, the country needs a clear policy and comprehensive efforts to protect and promote independent programming. While Internet-based distribution is a helpful democratizer of voices – and must be allowed to flourish – some populations, including many rural Americans and senior citizens, lack access to Internet connectivity. As a result, traditional distribution channels such as cable and DBS remain vital sources of information that must support independent voices.[7]

I. The Commission Should Define "Independent Video Programming Vendor" to Include Genuinely Independent Voices that Lack Leverage to Negotiate Fair Terms with Large Distributors.

The Commission proposes to apply the rules it adopts in this proceeding to program carriage agreements between MVPDs and "independent video programming vendors."[8] In order to protect independent programmers, the Commission should employ a definition of "independent video programming vendor" that protects small programmers who lack the leverage to negotiate fair terms with the bottleneck MVPDs, while being careful to not make the

[7] As the Commission recently noted in its annual video competition report, compared to the general population, adults over the age of 65 are more likely to rely on traditional television to access video content as opposed to online methods. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, DA 17-71, MB Docket No. 16-247 ¶ 179 (Jan. 17, 2017) ("*Eighteenth Video Competition Report*") ("Adults aged 65 years or older spend the most time watching traditional television —at 48 hours per week compared to an average of 29 hours for all Americans.").

[8] *NPRM* ¶ 16.

definition so broad that it includes large corporations that do not need the government's assistance.

RFD-TV agrees with the Commission's suggestion that defining an independent programmer simply as a programmer that is "not vertically integrated with an MVPD" is too general of a definition.[9] Defining an independent programmer so broadly has the potential to incorporate many large programmers that already are well-positioned to negotiate fair terms of carriage. The Commission instead should define "independent video programming vendor" in a manner that ensures that truly independent programmers are protected during carriage agreement negotiations without providing larger, established programmers with an unnecessary advantage.

II. The Commission Should Protect Independent Video Programming Vendors by Prohibiting Unconditional Most Favored Nation ("MFN") and Unreasonable Alternative Distribution Method ("ADM") Clauses in Carriage Agreements.

Unconditional MFN and unreasonable ADM provisions inhibit the distribution of diverse, independent programming and disproportionately harm independent programmers. The combination of MFN and ADM provisions in carriage agreements can preclude distribution of independent programming through alternative outlets such as online video distributors ("OVDs"); prevent independent programmers from entering into innovative carriage arrangements; and deny programmers the flexibility to respond to changing market conditions. The Commission should therefore adopt its proposal to establish rules prohibiting the inclusion of unconditional MFN and unreasonable ADM provisions in carriage agreements between MVPDs and independent programmers.[10]

[9] *See NPRM* ¶ 16.

[10] *NRPM* ¶¶ 18, 23.

A. Unconditional MFNs prevent independent programmers from entering into innovative carriage arrangements.

Unconditional MFNs enable MVPDs to “cherry pick” provisions in an affiliation agreement between the programmer and another distributor without taking on any of the other distributor’s reciprocal obligations. By allowing an MVPD to pick on a provision-by-provision basis the best contract terms, an independent programmer’s worst terms essentially become its only terms in all contracts with distributors. Because unconditional MFNs force providers to offer the same terms to all distributors, irrespective of any bargain struck, it limits the flexibility of content providers to enter into unique deals with new distributors.[11] For example, unconditional MFN provisions prevent an independent programmer from offering better terms to another MVPD in exchange for carriage or to get on a more broadly penetrated tier because the programmer would then be forced to offer these same terms to other MVPDs without receiving the reciprocal benefit. These provisions can also make it difficult for independent programmers to experiment with pricing in order to pursue carriage on innovative OVD platforms. In addition, unconditional MFN rights on packaging terms may restrict a programmer from offering content to an OVD on an a la carte basis or from permitting the OVD to carry the programming outside of a “basic tier.” Unconditional MFNs therefore result in new platforms, technologies, service offerings, and business models developing at a slower pace.

In RFD’s experience, large MVPDs simply demand unconditional MFNs with little or no opportunity for negotiation. Because independent programmers such as RFD-TV generally lack the bargaining power necessary to resist MVPDs’ demands for unreasonable and unfair MFN treatment, they are often forced to accept MFN provisions proposed by MVPDs regardless of

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[11] As the Commission recognized, MFN provisions “appear designed to discourage or foreclose the wider distribution of video content, including on online platforms.” *NPRM* ¶ 19.

how harmful they may be. Even when carriage agreements expire, large MVPDs often refuse to revisit existing burdensome provisions such as unconditional MFN clauses, and instead insist on simply extending prior terms without discussion. This effectively leaves harmful MFN provisions in place in perpetuity. RFD-TV therefore supports the Commission's proposal to level the playing field for carriage agreement negotiations by adopting a rule that prohibits unconditional MFN provisions that enable MVPDs to select favorable terms without any corresponding obligations.

B. Unreasonable ADMs deny independent programmers the flexibility to respond to changing market conditions.

Like unconditional MFNs, unreasonable ADMs hinder the development of diverse content, service offerings, and platforms for distribution. While consumers increasingly want to purchase and watch content through OVD methods, blanket ADM provisions prohibit independent programmers such as RFD-TV from meeting this demand and offering programming through alternative outlets.

Unreasonable ADMs can restrict competition and prevent the market from evolving toward new methods of video distribution and new business models. ADM provisions often prohibit an independent programmer from licensing content to OVDs for an extended period of time or place significant restrictions on online distribution. These provisions are generally overbroad and go beyond merely protecting an MVPD's ability to have an exclusive distribution window or to protect its investment. ADM provisions foreclose OVDs from accessing valuable content which is necessary in order for OVDs to successfully compete with traditional MVPDs, and prevent independent programmers from reaching consumers through competitive platforms.[12] Robust competition between OVDs and MVPDs can result in higher-quality service, lower prices, and more consumer choice. To realize these benefits, the Commission should promptly adopt its proposal to prohibit unreasonable ADM provisions in carriage agreements.

RFD-TV has recently seen first-hand how innovative distribution platforms can allow independent programmers to take advantage of new technologies and meet evolving consumer demand. In early December 2016, AT&T added RFD-TV to its DIRECTV NOW video streaming service, including it on the basic package at $35 per month for 65 channels, as well as DIRECTV NOW's other three channel-tier bundles.[13] Through DIRECTV NOW, RFD-TV viewers are able to watch RFD-TV anytime, anywhere, and on any device. DIRECTV NOW is a shining example of an MVPD listening to its customers and embracing, rather than fighting, changing market conditions. Unfortunately, opportunities like DIRECTV NOW are still few and far between, and difficult to pursue. Prohibiting unreasonable ADM provisions is an essential first step in helping independent programmers to thrive by distributing their content in new and innovative ways.

The Commission proposes to prohibit ADM provisions that restrict a programmer's ability to license its content to OVDs. But OVDs are not the only vehicle for publication on the Internet – some programmers may prefer to self-publish via their own web portals.[14] Allowing

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[12] *See Eighteenth Video Competition Report* ¶ 144 ("The entry of new OVDs and the growth of the OVD marketplace depend on the ability of OVDs to acquire or create compelling programming that will attract viewers and subscribers.").

[13] *See* Press Release, RFD-TV, RFD-TV Debuts DIRECTV NOW (Dec. 9, 2016), http://www.rfdtv.com/story/34016120/rfd-tv-debuts-on-directv-now#.WFKFg9UrKw4.

[14] *See Eighteenth Video Competition Report* ¶ 162 ("In addition to the exclusive and original content offered by the largest OVDs, a number of websites owned and operated by broadcast and cable networks offer content from their networks at no additional charge. According to SNL

independent programmers to self-publish their content can help build viewership and increase revenue. This not only benefits independent programmers, but also has the potential to benefit MVPDs by driving viewers to subscribe to the MVPDs' services in order to view the programming on the MVPD's network. The Commission's rule prohibiting the inclusion of unreasonable ADM provisions in carriage agreements between MVPDs and independent programmers should extend to overbroad provisions that restrict or penalize online distribution, regardless of the means.

III. The Commission Should Also Address MVPD Practices Such as Bundling, Lengthy Contracts, and High Termination Fees that Impede the Distribution of Diverse, Independent Programming.

As RFD-TV has outlined in its previous comments in this proceeding, the existing MVPD model, with features such as bundling, lengthy subscriber contracts, and early termination fees, significantly harms independent programmers and programming diversity.[15] Bundling of channels into large, expensive tiers reduces the number of independent channels available to consumers, which prevents independent voices from being heard. The high switching costs associated with lengthy subscriber contracts and early termination fees restrict consumer choice and reduce the disciplining effect of competition. RFD-TV therefore recommends that in addition to the proposed rules prohibiting unconditional MFN and unreasonable ADM provisions in carriage agreements, the Commission adopt rules that address other harmful practices such as bundling, lengthy consumer contracts, and high termination fees.

Kagan, every major broadcast network except NBC increased the amount of these online offerings between 2014 and 2015.").

[15] *See* Comments of RFD-TV, MB Docket No. 16-41, at 20 (filed Mar. 30, 2016) ("*RFD-TV Comments*"); Reply Comments of RFD-TV, MB Docket No. 16-41, at 12-13 (filed Apr. 19, 2016) ("*RFD-TV Reply Comments*").

A. Bundling practices prevent independent voices from being heard.

In the *NPRM*, the Commission seeks further comment on bundling practices by video programming vendors and how these practices affect MVPDs' ability to carry independent programming.[16] There is widespread agreement that bundling impedes the distribution of diverse, independent programming.[17] As RFD-TV has previously explained, bundling practices by large programmers have the effect of squeezing out independent voices.[18] Today, six major media companies control the vast majority of programming revenues, and MVPDs must carry upwards of 60 or 70 channels before they even think about carrying a genuinely independent voice. Bundling practices require consumers to purchase dozens of channels—including those that the consumer may have no interest in watching—and displace independent channels like RFD-TV. They may also have the effect of relegating independent programmers to more expensive, less penetrated tiers, which further limits independent programmers' ability to reach their customers. [19]

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[16] *NPRM* ¶ 33.

[17] *See, e.g.*, Comments of TheBlaze, MB Docket No. 16-41 at 8 (filed Mar. 30, 2016) ("When large media companies force MVPDs to carry (and pay for) networks with little consumer demand (or audience) as a condition to renewing or carrying networks that appeal to broader audiences or may include 'must have' programs, it drains essential bandwidth and capital that could otherwise be deployed on diverse voices."); Comments of Free Press, MB Docket No. 16-41 at 12 (filed Mar. 30, 2016) ("Expansive bundling requires MVPDs to devote outsized financial resources to purchasing incumbents' undesirable programming, crowding out capacity and financial resources that cable distributers could commit instead to independent and diverse programs."). *See also Eighteenth Video Competition Report* ¶ 33.

[18] *RFD-TV Comments* at 25-27; *RFD-TV Reply Comments* at 13.

[19] *See, e.g., Eighteenth Video Competition Report* ¶ 33 ("NTCA, which represents nearly 900 rural local exchange carriers, maintains that forced tying and tiering make it particularly difficult for small rural carriers to offer video packages that reflect what rural subscribers want and can afford.").

B. Lengthy consumer contracts and termination fees raise switching costs and limit the potential benefits of MVPD competition.

The Commission also asks if there are any actions it can take to "protect consumers from programming disruptions resulting from an MVPD's decision to drop an independent programmer from its lineup."[20] As RFD-TV has explained, multi-year subscriber contracts and early termination fees raise consumers' switching costs and limit the benefits of MVPD competition.[21] While MVPDs often tout increased competition in MVPD services, many MVPDs continue to lock customers into lengthy contracts or charge significant cancellation fees, even when customers enroll specifically on the promise of obtaining particular programming such as RFD-TV. By preventing consumers from voting with their wallets and influencing programming decisions, these termination fees inhibit the benefits of any competition among MVPDs. RFD-TV recommends that the Commission adopt a rule that permits MVPD subscribers to cancel, without penalty, a subscription television package within a specified time period, e.g., 90 days, after the MVPD has dropped a programmer from its lineup.

The Commission has previously recognized the effects of switching costs on competition and the availability of competitive alternatives. For example, the switching costs associated with changing phone numbers in order to switch wireless carriers led to local number portability.[22]

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[20] *NPRM* ¶ 33.

[21] *RFD-TV Comments* at 25-27; *RFD-TV Reply Comments* at 12-13.

[22] *See In the Matter of Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 ¶¶ 2-3 (1996); *See also* Press Statement of Commissioner Kevin J. Martin on the Commission's Decision on Verizon's Petition for Permanent Forbearance from Wireless Local Number Portability Rules (July 16, 2002), https://apps.fcc.gov/edocs_public/attachmatch/DOC-224368A4.pdf ("The inability of consumers to keep their phone numbers when they switch carriers can be an impediment to competition. It imposes a cost to switching carriers, which, for many consumers, could be significant. . . . These costs not only provide a disincentive for consumers that may want to switch providers, they also disadvantage new entrants to the market.").

The sunk costs associated with mobile device investments led to cell phone unlocking rules that further facilitated consumers' ability to switch wireless carriers.[23] And in 2015, the Commission adopted Open Internet rules in part because high switching costs can impede consumers' ability to show their dissatisfaction with their current broadband provider by switching to a new provider.[24] Allowing consumers to more easily cancel a subscription television package after an MVPD drops an independent programmer would be in line with these previous Commission actions and in the public interest.

IV. The Commission has Legal Authority to Take Action to Preserve Independent Programming and Protect Consumers.

The Commission has ample authority to take action to ensure the availability of independent programming. A plain reading of Section 616 of the Communications Act allows the Commission to regulate practices between MVPDs and independent programmers that limit the diversity of content and consumer choice, and hinder competition.[25] Moreover, based on the parallel structure between Sections 616 and 628 of the Act, it is clear that the specific regulatory requirements under Section 616(a) are simply minimum requirements and therefore do not

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[23] *See* FCC Chairman Tom Wheeler Statement on Signing of Cell Phone Unlocking Bill, (Aug. 1, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-328624A1.pdf (supporting President Obama's signing of the cellphone unlocking bill, and stating that the bill "gives consumers the freedom to switch between wireless carriers without having to purchase a new cellphone, allowing them to choose the mobile service plan that fits their specific needs and budget").

[24] *See In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 ¶ 81 (2015) (finding that the "broadband provider's position as gatekeeper is strengthened by the high switching costs consumers face when seeking a new service," and that "consumers' ability to respond to unjust or unreasonable broadband provider practices are limited by switching costs").

[25] 47 U.S.C. § 536(a).

preclude the agency from establishing regulations to ensure the availability of diverse, independent programming.[26]

A. Section 616 gives the Commission broad authority over carriage agreements that the Commission has not previously exercised.

Section 616 of the Act contains a broad grant of authority for the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors."[27] This statutory language is clear on its face and easily encompasses practices that MVPDs engage in to freeze out independent channels and carriage of independent programming by MVPDs.

Although the Commission historically has limited its rules issued under Section 616 to the specific practices identified in Section 616(a)(1)-(3), the plain language of Section 616(a) is not so limited. Moreover, the dynamics of the video marketplace have changed since the Commission first implemented Section 616. While competition has improved in certain facets of the video market, there is a growing chasm between the plight of large media conglomerates and genuinely independent programmers that has proven to be a pervasive form of market failure. Since the 1990s, there has been a dramatic reduction in the percentage of diverse and independent programming.[28] Independent programmers are consistently being left behind while larger programmers experience continued and growing success.[29] The Commission would be

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[26] 47 U.S.C. §§ 536(a), 548(c).

[27] 47 U.S.C. § 536(a).

[28] *See, e.g.*, Mark Cooper, Consumer Federation of America, The Impact of the Vertically Integrated, Television-Movie Studio Oligopoly on Source Diversity and Independent Production, at 34-35 (2006) (finding that independent programming fell from nearly half of prime time shows in 1989 to less than one-fifth of prime time shows by 2006), http://www.ifta-online.org/sites/default/files/Impact_Intergrated_TV-Movie_Independent_Production.pdf.

[29] As one example, many of the largest programming conglomerates are affiliated with major broadcasters. Retransmission consent fees have grown from minimal levels in the 1990s, and as

justified in re-evaluating its authority under Section 616 to take the relatively modest steps proposed in the *NPRM* to address a pervasive and growing threat to independent programming that harms consumers.

This interpretation of Section 616's first sentence it is not wholly unbounded, however. The statute specifically limits Section 616's scope to program carriage agreements between MVPDs and video programming vendors, and is subject to the Commission's public interest standard.

B. Like Section 628(c), the specific regulatory requirements of Section 616 are simply minimum requirements.

The structure of Section 616 is notable in that it parallels the structure of the program access provision, Section 628(c), with a broad initial grant of authority to issue regulations followed by specific content that those regulations must contain.[30] With respect to Section 628(c), the Commission and the courts have confirmed that the specific regulations mandated in Section 628(c) create a floor, not a ceiling, for the Commission's authority.[31] Because the structure of Section 616(a) and 628(c) are so similar, the Commission should take a similar approach to interpreting and applying those provisions. The Commission should therefore conclude that, like Section 628(c), the specific regulatory requirements under Section 616(a) are simply minimum requirements and, accordingly, do not preclude the Commission from relying

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recently as 2006 totaled only $214 million. Recent estimates, however, put retransmission consent fees at $6.5 billion in 2015, and are estimated to grow to $10.1 billion by 2021. Mike Farrell, *Kagan: Retrans Fees to Rise to $10.3B by 2021*, MULTICHANNEL NEWS, (July 7, 2015), http://www.multichannel.com/news/policy/kagan-retrans-fees-rise-103b-2021/391971 (citing SNL Kagan report). Independent programmers have not remotely experienced that level of growth.

[30] 47 C.F.R. § 548(c).

[31] *See Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 705 (D.C. Cir. 2011).

on Section 616(a) to establish regulations to ensure the availability of diverse, independent programming.

628(c)(2) does contain a subheading, "[m]inimum content of regulations," that confirms the natural reading of the provision's specific requirements as a floor rather than a ceiling. But the notion that this subheading somehow compels a different interpretation of 616(a) from 628(c) places too much weight on a mere heading. Under traditional interpretive methods, statutory headings have limited interpretive value and, at most, can help inform the analysis.[32] Here, the parallel structure of the two provisions is far more informative than the heading and should lead the Commission to conclude that Section 616's specific regulatory requirements are similarly best read as minimum contents.

CONCLUSION

It was William Jennings Bryan who wrote, "[b]urn down your cities and leave our farms, and your cities will spring up again as if by magic; but destroy our farms and grass will grow in the streets of every city in the country."[33] Over the past three years, more than 200,000 RFD-TV viewers have made their voices heard at the FCC and demonstrated that RFD-TV provides unique programming that serves the needs and interests of rural as well as urban Americans and senior citizens. Public comments filed in the Comcast-Time Warner Cable merger review proceeding, the AT&T-DIRECTV merger review proceeding, and now this proceeding, demonstrate that there is a very strong demand in this country for rural-and senior-oriented programming such as that provided by RFD-TV. This proceeding is an important first step in a

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[32] *See, e.g., Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.,* 331 U.S. 519, 529 (1947) ("For interpretive purposes, [statute titles and section headings] are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.").

[33] William Jennings Bryan, "Cross of Gold Speech" delivered at the Democratic National Convention (July 9, 1896).

comprehensive effort to promote and protect independent programmers such as RFD-TV. By adopting its proposed rules, the Commission will allow RFD-TV to bridge the growing divide between urban and rural America.

Respectfully submitted,

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ATTACHMENT A